

Markets in Financial Instruments Directive II Implementation – Consultation Paper VI

Consultation Paper

CP17/19***

3 July 2017

How to respond

We are asking for comments on this Consultation Paper (CP) by 7 September 2017.

You can send them to us using the form on our website at: www.fca.org.uk/your-fca/documents/consultation-papers/cp17-19-response-form.

Or in writing to:

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Canary Wharf
London E14 5HS

Telephone:
020 7066 9758

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How to navigate this document onscreen



returns you to the contents list



takes you to helpful abbreviations

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1 Summary

Why we are consulting

- 1.1** We have finalised our rules implementing MiFID II. Following on from PS17/5 published in March, PS17/14 is being published alongside this consultation paper (CP).
- 1.2** This sixth CP on issues related to the implementation of MiFID II covers a small number of Handbook changes which we have not previously been able to consult upon.

Who this applies to

- 1.3** This consultation affects a wide range of firms that we do or will authorise and recognise, as well as certain persons not requiring authorisation but who are subject to obligations under MiFID II and MiFIR, particularly:
- banks
 - investment firms
 - recognised investment exchanges (RIEs)
 - multilateral trading facilities (MTFs)
 - organised trading facilities (OTFs)
 - commercial firms trading financial and commodity derivatives
- 1.4** Consumers have a clear interest in financial markets that operate fairly and transparently, which is the rationale for the proposals in this CP. Of the subjects covered, proposals relating to FSCS cover for RIEs who operate at least one MTF or OTF will be of most concern to consumers.

What we want to change

Financial Services Compensation Scheme (FSCS) cover for recognised investment exchanges (RIEs) operating multilateral trading facilities (MTFs) and organised trading facilities (OTFs)

- 1.5** We propose in Chapter 2, to bring RIEs operating MTFs and OTFs into the scope of the FSCS because MiFID II requires them to adhere to an investor compensation scheme. As such, we propose FSCS base cost contributions for operators of regulated markets that operate an MTF or OTF and propose the funding class that such operators should be part of for the purpose of levies for the specific costs directly related to the paying of compensation and compensation costs.



Decision Procedure and Penalties Manual (DEPP) and Enforcement Guide (EG)

- 1.6** We propose in Chapter 3, changes to our proposed amendments to the Decision Procedures and Penalties Manual (DEPP) and Enforcement Guide (EG) as described in CP17/8. These arise from the final version of legislation introduced by Her Majesty's Treasury (the Treasury) implementing MiFID II, which was laid on 22 June 2017, but do not change the substance of our proposals in CP17/8.

Consequential changes to the Prospectus Rules (PR) and Glossary

- 1.7** We propose in Chapter 4, technical changes to the Prospectus Rules and Glossary in our Handbook arising out of legislative changes by the Treasury to implement MiFID II.

Outcome we are seeking

- 1.8** The proposals within this CP, and our feedback provided in PS17/5 and PS17/14, assist with our implementation of MiFID II. Taken as a whole, MiFID II will enhance our ability to meet our objectives. It contains important requirements to strengthen investor protection and to improve the efficiency and integrity of secondary markets. MiFID II imposes a requirement for firms conducting investment services and activities to join an investor compensation scheme to ensure that when a firm is unable to pay' claims against it, those consumers can obtain compensation. Currently if an RIE running an MTF were unable to pay claims against it users would have no recourse to a compensation scheme and could suffer financial distress. The requirement for RIEs to join the FSCS when running an MTF and an OTF addresses this potential harm.
- 1.9** We have considered the equality and diversity issues that may arise from the proposals in this consultation. Overall, we do not consider that the proposals in this CP adversely affect any of the groups with protected characteristics i.e. age, disability, sex, marriage or civil partnership, pregnancy and maternity, race, religion and belief, sexual orientation and gender reassignment.

Next steps

What readers need to do next

- 1.10** We want to know what you think of our proposals. Please send us comments by 7 September 2017, using the online response form on our website or by writing to us at the address on page 2.

What we'll do next

- 1.11** We will consider your feedback and aim to finalise the necessary rule changes by November 2017.

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Financial Services Compensation Scheme (FSCS) cover for recognised investment exchanges (RIEs) operating multilateral trading facilities (MTFs) and organised trading facilities (OTFs)

Who should read this chapter

Recognised investment exchanges operating multilateral trading facilities and organised trading facilities

Introduction

- 2.1** Under MiFID, operators of regulated markets (in the UK, RIEs are operators of regulated markets) were not required to join investor compensation schemes when operating an MTF, but investment firms operating MTFs were. The European Commission decided that this provided an unfair cost advantage to operators of regulated markets when running MTFs and could undermine investor protection. It therefore proposed an amendment, as part of the negotiations on MiFID II that required operators of regulated markets to join an investor compensation scheme when operating an MTF or OTF (OTFs are a new category of trading venue introduced by MiFID II and investment firms operating them also have to join an investor compensation scheme). This amendment was included in the final version of MiFID II.
- 2.2** The change introduced by MiFID II described above means that we must make rules to bring RIEs within the scope of the UK's investor compensation scheme, the Financial Services Compensation Scheme (FSCS). As a result, we must also make rules enabling the (FSCS) to impose appropriate levies on RIEs. Because their members and participants are financial market intermediaries, we do not think, however, that the MTFs, or prospective OTFs, run by RIEs are likely to undertake compensatable business.

Existing provisions

- 2.3** FSCS coverage currently applies to investment firms operating MTFs, but not to RIEs. MiFID II introduced OTFs as a concept and we have already consulted on adding the activity of operating an OTF (where carried out by an investment firm) to the scope of FSCS coverage.



Proposals

- 2.4** As described above, MiFID II requires RIEs operating an MTF or OTF to join the FSCS. Firms covered by the FSCS are required to pay base costs¹ to contribute to the general running costs of the FSCS. At present, authorised persons currently covered by the FSCS calculate their contribution towards the base costs levy in proportion to the amount of regulatory fees that they pay. However, for RIEs operating MTFs or OTFs, we propose that this contribution should be £1,000 per year per RIE.
- 2.5** The specific costs and compensation costs for assessing claims and making payments by the FSCS are levied on classes of firms that are authorised to carry out business that can give rise to compensation claims. We propose we add the activities of operating an MTF or an OTF, where carried out by an RIE, to funding class D2, investment intermediation. This class already contains investment firms operating MTFs and it is proposed that it also contains investment firms operating OTFs. As a result RIEs operating OTFs or MTFs would contribute to specific costs and compensation costs in accordance with their annual eligible income from doing compensatable business, as for other members of class D2.

Implications for firms

- 2.6** A base costs levy of £1,000 is likely to be significantly lower than the fee that RIEs operating an MTF or OTF would pay if, like firms who participate in the FSCS, they were charged a base costs contribution based on regulatory fees. We believe that this difference of approach is appropriate because unlike relevant persons, RIEs are not authorised persons (or appointed representatives). Therefore, without a change to the Financial Services and Markets Act 2000 (FSMA), there is no possibility that the RIEs' other activities (which are by far the majority of their activities and are used to calculate their regulatory fees) are or can be covered by the FSCS or may become compensatable business. We acknowledge this, and seek to minimise the impact of the administrative cost to join the scheme. This is why we propose to subject them to the minimum levy to achieve this.
- 2.7** Although RIEs operating an MTF or OTF are unlikely to be conducting compensatable business we still think it is appropriate for them to pay a nominal contribution towards the base costs of the FSCS because the:
- FSCS will have expenses as a result of extending cover to such RIEs
 - whole financial services industry, including RIEs, benefits from the consumer confidence provided by the FSCS.
- 2.8** Members of funding class D2 are required to pay FSCS levies to cover compensation and specific costs² which fall into that class. We propose that RIEs which operate MTFs and OTFs will be required to report annual eligible income in order to calculate their contribution to these levies, in the same way as for the relevant persons who are the current members of class D2. We do not think that RIEs operating MTFs or OTFs are likely to do any compensatable business. Consequently, RIEs' contributions

¹ In 2016-17 the FSCS levied £22m in total to cover base costs.

² These are FSCS expenses which relate to the payment of compensation, as opposed to the general costs of running the FSCS.

to compensation or specific costs levies in class D2 are likely to be zero if the RIEs calculate their annual eligible income according to how much compensatable business they actually do.

- 2.9** In the unlikely event that an RIE operating a MTF or OTF went into default and any claims were made on the FSCS, then other firms in the D2 class would be required to cover the cost of such claims via their contribution to class D2's levies.

Implications for consumers

- 2.10** In practice we do not believe there are any implications for consumers, because eligible claimants (in particular, individual consumers and small businesses) are not likely to be dealing with RIEs operating MTFs or OTFs. Consequently, it seems unlikely that there would be a claim on the FSCS in the event of the failure of an RIE operating a MTF or OTF.

References

- 2.11** We consulted on extending FSCS coverage to firms operating OTFs in CPs 16/19 and 16/29.³
- 2.12** Article 5 of MiFID II (2014/65/EU) requires RIEs operating MTFs or OTFs to be covered by an investor compensation scheme. This is explained in the Treasury's response to the consultation on the transposition of MiFID II at paragraphs 10.8-10.12 (pp29-30).⁴
- 2.13** The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017, SI 2017/701, amend s213 of FSMA to enable the FCA to make rules extending FSCS cover to such RIEs.⁵

Q1: Do you agree with our levy proposals which arise from the extension of the FSCS to RIEs operating an MTF or OTF? If not, please give reasons why.

Q2: Do RIEs who operate an MTF or, prospectively, an OTF think they carry on business with or on behalf of any eligible claimant? If so, we would appreciate information from RIEs on the number of eligible claimants they might have, and what the cost of calculating annual eligible income might be.

3 CP16/19: www.fca.org.uk/publication/consultation/cp16-19.pdf and CP16/29: www.fca.org.uk/publication/consultation/cp16-29.pdf

4 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/590504/PU2037_MIFID_final_web.pdf

5 <https://www.legislation.gov.uk/id/uk/si/2017/701>



3

Decision Procedure and Penalties Manual (DEPP) and Enforcement Guide (EG)

Who should read this chapter

Prospective Data Reporting Services Providers (DRSPs); firms trading commodity derivatives or economically equivalent over-the-counter contracts; persons engaged in algorithmic trading, providing the services of direct electronic access (DEA) to a Regulated Market (RM) or Multilateral Trading Facility (MTF) or providing the service of acting as a general clearing member; and investment firms, credit institutions, Recognised Investment Exchanges (RIEs), and non-authorised counterparties on whom requirements are imposed by the derivatives trading obligation in Article 28 of MiFIR.

Introduction

- 3.1** In Appendix 1 we set out our remaining final proposed changes to DEPP and EG, first outlined in CP17/8, in light of the changes introduced by the final version of the Treasury's implementing statutory instruments⁶, which were laid on 22 June 2017.
- 3.2** In CP17/08 we consulted on our proposed changes to DEPP and EG, on the basis of the version of the MiFI Regulations and the DRS Regulations published on 16 February 2017. As these differ from the final statutory instruments published, we have decided to re-consult on our proposed amendments to DEPP and EG, except on those proposals, relating to the authorisation and verification of data reporting service providers, which were finalised and published in PS17/14.
- 3.3** For the purposes of DEPP and EG, only the following substantive changes have been made to the implementing statutory instruments:
- the extension of powers under the MiFI Regulations to non-authorised counterparties subject to Article 28 MiFIR
 - the extension of enforcement powers under the MiFI Regulations against members of the management body or senior management of persons subject to requirements under the MiFI Regulations or Article 28 MiFIR
 - the application of the power to require restitution to persons subject to requirements under the MiFI Regulations
- 3.4** While the above changes have not in every case resulted in textual changes to our proposed amendments to DEPP or EG as outlined in CP17/8, they have resulted in a

⁶ The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (the MiFI Regulations <http://www.legislation.gov.uk/id/uksi/2017/701>) and the Financial Services and Markets Act 2000 (Data Reporting Service) Regulations 2017 (the DRS Regulations <http://www.legislation.gov.uk/id/uksi/2017/699>).

widening in the scope of the underlying powers in such a way that we have concluded that further consultation is appropriate.

- 3.5** This CP should therefore be read together with CP17/08. The Handbook Instrument annexed to this CP, sets our final proposed amendments to DEPP and EG.

Existing provisions

- 3.6** The majority of the enforcement powers required by MiFID II are already available to the FCA.⁷ The main exception to this is the new power to require investment firms, credit institutions and recognised investment exchanges to remove persons from their management boards, as well as powers over DRSPs and certain other entities subject to requirements under the MiFI Regulations.

Proposals

Proposed changes to EG

- 3.7** Our proposed amendments to EG were outlined in Chapter 3 of CP17/8. These proposals are amended as follows:
- Proposed EG 19.34.1 is amended to include a reference to our powers to impose sanctions for contravention of Article 28 MiFIR and any directly applicable regulation made under that article. Our proposal to follow our current approach, policies and procedures, as outlined in CP17/8, will apply to the enforcement of these contraventions.
 - Proposed EG 19.34.1 and EG 19.35.1 are amended to clarify that a reference to requirements under the MiFI Regulations and the DRS Regulations, includes a reference to requirements imposed by MiFIR and any directly applicable EU regulation made under MiFIR or MiFID II on persons subject to those regulations.

- 3.8** In addition, while no changes to our proposed amendments to DEPP and EG are necessary as a result, we note that our powers to impose sanctions for contravention of MiFI Regulations now extend to members of the management body or senior management responsible for the contraventions, and the proposals in CP17/8 should be read accordingly.

Proposed changes to DEPP

- 3.9** Our proposed amendments to DEPP were outlined in Chapter 3 of CP17/8. These proposals are amended as follows:
- DEPP 2 Annex 1G is amended to state that the Regulatory Decisions Committee (RDC) will take the decision to give a notice proposing or deciding to require restitution to be paid, in light of new powers to require restitution for contravention of the MiFI Regulations.

⁷ Under Parts IVA (Permission to carry on regulated activities), V (Performance of regulated activities), XI (Information Gathering and Investigations), XIV (Disciplinary measures and XXV (Injunctions and Restitution) of FSMA as may be amended and applied by the MiFI Regulations and the DRS Regulations.



- DEPP 2 Annex 2G. is amended to state that the decision to give a notice proposing or deciding to impose a requirement in exercise of our intervention powers under Regulations 10 and 12 of the MiFI Regulations will be made by the RDC if it is a fundamental requirement and the subject decides to contest its imposition. In every other case, the decision will be taken under executive procedures.

3.10 We are otherwise proposing to make consequential changes to our proposed amendments to DEPP and EG only.

Implications for firms

3.11 Authorised and unauthorised persons, subject to MiFID II requirements enforceable under the MiFI Regulations or the DRS Regulations will be subject to the same decision making procedures and penalty policy currently applied by the FCA when it takes enforcement action against authorised persons.

Implications for consumers

3.12 It is in consumers interests that authorised and unauthorised entities subject to obligations under MiFID II and MiFIR comply with their obligations. This will strengthen the integrity of the UK's financial markets.

Question

Q3: Do you have any comments regarding our proposed implementation approach and the amendments we propose to make to DEPP and EG?

4

Consequential changes to the Prospectus Rules (PR) and Glossary

Who should read this chapter

Investment firms, branches of third-country firms authorised in the UK to undertake investment services and UK firms exempt from authorisation under Article 3 of MiFID UK and overseas issuers with UK-listed securities or considering a UK listing of their securities

Issuers and other persons who make public offers of transferable securities or seek admission of transferable securities to regulated markets in the UK

Firms advising issuers or on the issuance of UK-listed securities

Firms and market participants who provide advice in relation to prospectuses

Firms and persons who invest or deal in transferable securities through public offers or regulated markets in the UK, and

Firms advising persons investing or dealing in listed securities or transferable securities

Introduction

- 4.1** We are proposing some small changes to the Prospectus Rules and the Glossary consequent on changes to Financial Services and Markets Act (FSMA) to implement MiFID II. These are consequential changes arising out of the implementation of MiFID II rather than changes that implement MiFID II.

Existing provisions

- 4.2** The amendments to the Prospectus Rules follow on from changes to Part VI FSMA and exempt offers to the public, as part of the Treasury's implementing regulations for MiFID II.

Proposals

- 4.3** The changes to s.86(7) FSMA made by the Treasury's implementing regulations will take effect from 3 January 2018. We therefore intend that our changes to the Glossary and to the PR should take effect from that same date. The PR changes arise from the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulation 2017.



- 4.4** The main change reflects the amendments to the definition of a 'qualified investor' in section 86(7)(d) FSMA in relation to an offer of transferable securities. That amendment means that a 'qualified investor' for the purposes of when an approved prospectus is required can continue to include a person 'grandfathered' over to the new category of 'professional clients' at the time when MiFID was implemented (a provision was included in MiFID to allow this but it is not specifically included in MiFID II). This category of clients may include former 'intermediate customers' (a category of clients from the UK's pre-MiFID client categorisation regime) who remain clients of the firm who did the grandfathering assessment.
- 4.5** As our FCA Handbook Glossary definition of 'qualified investor' is closely aligned with the definition in s.86(7) we propose aligning it to the s.86(7) definition. We also: (1) amend the definition of 'qualified investor' in our Prospectus Rules (PR) sourcebook which uses the Glossary definition; and (2) amend PR 1.2.1 UK which reproduces s.86(7) FSMA for the convenience of the reader of the PR.

Implications for firms

- 4.6** The definition changes mean that a 'qualified investor' for the purposes of when an approved prospectus is required can continue to include a person 'grandfathered' over to the new category of 'professional clients' at the time when MiFID was implemented (a provision was included in MiFID to allow this but it is not specifically included in MiFID II).

Q4: Do you agree with our proposals to amend the Prospectus Rules and the Glossary? If not, please give reasons why.

Annex 1

Questions in this paper

- Q1:** Do you agree with our levy proposals which arise from the extension of the FSCS to RIEs operating an MTF or OTF? If not, please give reasons why.
- Q2:** Do RIEs who operate an MTF or, prospectively, an OTF think they carry on business with or on behalf of any eligible claimant? If so, we would appreciate information from RIEs on the number of eligible claimants they might have, and what the cost of calculating annual eligible income might be.
- Q3:** Do you have any comments regarding our proposed implementation approach and the amendments we propose to make to DEPP and EG?
- Q4:** Do you agree with our proposals to amend the Prospectus Rules and the Glossary? If not, please give reasons why.



Annex 2

Cost benefit analysis

Introduction

1. FSMA, as amended by the Financial Services Act 2012, requires us to publish a cost benefit analysis (CBA) of our proposed rules. Specifically, section 138I requires us to publish a CBA of proposed rules, defined as 'an analysis of the costs, together with an analysis of the benefits that will arise if the proposed rules are made'.
2. This analysis presents estimates of the significant impacts of our proposal. We provide monetary values for the impacts where we believe it is reasonably practicable to do so. For others, we provide estimates of outcomes in other dimensions. Our proposals are based on carefully weighing up these multiple dimensions and reaching a judgement about the appropriate level of consumer protection, taking into account all the other impacts we foresee.

Financial Services Compensation Scheme (FSCS) cover for recognised investment exchanges (RIEs) operating multilateral trading facilities (MTFs) and organised trading facilities (OTFs)

Introduction

3. The proposal as set out in Chapter 2 is that the activity of an RIE operating an MTF or OTF should be covered by the FSCS, as required by MiFID II.

Rationale for Intervention

4. We are implementing the requirements of MiFID II, as we must under EU law.

Baseline for Analysis

5. RIEs currently incur no costs in this area as there is no current FSCS coverage for the activity they undertake.

Costs

6. As set out in the main consultation paper, we believe that there are two potential areas of cost for RIEs. These are contributions to base costs and contributions to FSCS levies to cover compensation and specific costs, with associated data reporting costs.
7. The main cost for RIEs will be the £1,000 annual contribution to base costs each RIE operating a MTF or OTF will be required to make. As a result of these payments, other firms which currently contribute to base costs will contribute less. Therefore, these payments are in effect a transfer from RIEs to other levy payers. There are currently eight RIEs, so the maximum total cost to RIEs (if all current RIEs operate a MTF or OTF) and level of transfer to other levy payers will be £8,000 per annum.

8. In relation to the determination of FSCS levies to cover compensation and specific costs, since we do not think that RIEs do business with eligible claimants we consider that they will accordingly submit an Annual Eligible Income (AEI) return of zero or apply for an exemption under FEES 6.2. In such circumstances, although their contribution to FSCS levies for compensation and specific costs will be zero, RIEs would face an increase in ongoing costs to provide the submission or one off costs to apply for the exemption. This increase in costs would predominantly be in the form of staff time but would be so small that it is not reasonably practicable to estimate these costs.

Benefits

9. We think it is unlikely that MTFs and OTFs run by RIEs will conduct compensatable business due to the nature of their counterparts. If RIEs undertake business with or for the benefit of eligible claimants, and therefore report more than zero AEI, there would be a benefit to those individuals in having FSCS coverage, as well as to other FSCS levy payers from those RIEs' contributions towards the specific costs and compensation costs levies for funding class D2.

Decision Procedure and Penalties and Penalties Manual (DEPP) and Enforcement Guide (EG)

10. Under section 138I of FSMA, when the FCA wishes to introduce any new rules it must publish a cost benefit analysis (CBA) along with the proposed rules. The proposals set out in this Chapter do not relate to rule changes or guidance on rules and do not impose additional obligations on firms. These proposals recommend applying our current policy and procedures to breaches of requirements under MiFID II and MiFIR and new sanctions that may be imposed under the MiFI Regulations and the DRS Regulations. Our current procedures will also apply when we consider authorisation applications or impose other measures under these Regulations. Depending on the provision in question, we either have no discretion in implementation or the proposed approach will not be substantially different from the FCA's current approach. The FCA does not expect that the proposal will lead to any increase in costs, or the cost increase will be of minimal significance if compared with any reasonable counterfactual.

Consequential changes to the Prospectus Rules (PR) and Glossary

11. The changes we propose to the relevant modules of the Handbook are a direct result of the changes imposed by the implementation of MiFID II. The proposed changes are administrative and they do not reflect any change in policy. As such, we do not believe that these consequential changes will add any significant costs or benefits to those already expected from MiFID II.



Annex 3

Compatibility statement

Compliance with legal requirements

1. This Annex records the FCA's compliance with a number of legal requirements applicable to the proposals in this consultation, including an explanation of the FCA's reasons for concluding that our proposals in this consultation are compatible with certain requirements under the Financial Services and Markets Act 2000 (FSMA).
2. When consulting on new rules, the FCA is required by section 138I(2)(d) FSMA to include an explanation of why it believes making the proposed rules is (a) compatible with its general duty, under s. 1B(1) FSMA, so far as reasonably possible, to act in a way which is compatible with its strategic objective and advances one or more of its operational objectives, and (b) its general duty under s. 1B(5)(a) FSMA to have regard to the regulatory principles in s. 3B FSMA. The FCA is also required by s. 138K(2) FSMA to state its opinion on whether the proposed rules will have a significantly different impact on mutual societies as opposed to other authorised persons.
3. This Annex also sets out the FCA's view of how the proposed rules are compatible with the duty on the FCA to discharge its general functions (which include rule-making) in a way which promotes effective competition in the interests of consumers (s. 1B(4)). This duty applies in so far as promoting competition is compatible with advancing the FCA's consumer protection and/or integrity objectives.
4. In addition, this Annex explains how we have considered the recommendations made by the Treasury under s. 1JA FSMA about aspects of the economic policy of Her Majesty's Government to which we should have regard in connection with our general duties.
5. This Annex includes our assessment of the equality and diversity implications of these proposals.
6. In relation to the proposal to extend FSCS cover to RIEs operating MTFs or OTFs, the FCA is obliged, under s.213(1) of FSMA, to design a compensation scheme under which valid claims are able to be paid. In doing so, the FCA is required by s.213(5) of FSMA to have special regard to the desirability of ensuring that the amount of levies imposed on a particular class of authorised person reflects, so far as practicable, the amount of claims made, or likely to be made, in respect of that class.
7. Under the Legislative and Regulatory Reform Act 2006 (LRRRA) the FCA is subject to requirements to have regard to a number of high-level 'Principles' in the exercise of some of our regulatory functions and to have regard to a 'Regulators' Code' when determining general policies and principles and giving general guidance (but not when exercising other legislative functions like making rules). This Annex sets out how we have complied with requirements under the LRRRA.

The FCA's objectives and regulatory principles: Compatibility statement

8. Taken as a whole, we believe that the implementation of MiFID II will advance the FCA's operational objectives of enhancing market integrity, protecting and enhancing the integrity of the UK financial system and ensuring an appropriate degree of protection for consumers.

9. The proposals in this consultation paper make changes to our rules that are necessary in light of Treasury legislation implementing MiFID II.

10. In preparing our proposals, we have paid attention to the regulatory principles set out in section 3B FSMA. In particular:

The need to use our resources in the most efficient and economical way

11. For the proposals in this CP where we have discretion have had regard to the burden on us in assessing how best to implement.

The principle that a burden or restriction should be proportionate to the benefits

12. We have sought to minimise the costs for RIEs joining the FSCS as we think they are, in most cases, unlikely to conduct compensatable business.

The desirability of sustainable growth in the economy of the United Kingdom in the medium or long term

13. We believe that our proposals do not have significant implications for the attractiveness of the UK as a location for financial services activity.

The general principle that consumers should take responsibility for their decisions

14. We do not believe the levy proposals arising from the extension of FSCS cover to RIEs operating an MTF or OTF have any implications for consumers, because eligible claimants (in particular, individual consumers and small businesses) are not likely to be dealing with RIEs operating MTFs or OTFs. Consequently, it seems unlikely that there would be a claim on the FSCS in the event of the failure of an RIE operating a MTF or OTF.

The responsibilities of senior management

15. We do not believe the proposals in this CP significantly impact on the responsibilities of senior management.

The desirability of recognising differences in the nature of, and objectives of, businesses carried on by different persons including mutual societies and other kinds of business organisation

16. We do not believe that our proposals discriminate against any particular business model or approach.

The desirability of publishing information relating to persons, or requiring persons to publish information

17. We have the power to publish information relating to investigations into firms and individuals. However, as set out in the Enforcement Guide, we will not normally make public our investigations, findings or conclusions public, except in exceptional circumstances.



The principle that we should exercise our functions as transparently as possible

18. We believe that by consulting on our proposals we are acting in accordance with this principle.
19. In formulating these proposals, the FCA has had regard to the importance of taking action intended to minimise the extent to which it is possible for a business carried on (i) by an authorised person or a recognised investment exchange; or (ii) in contravention of the general prohibition, to be used for a purpose connected with financial crime (as required by s. 1B(5)(b) FSMA).

Expected effect on mutual societies

20. Section 138K of FSMA requires us to state whether, in our opinion, our proposed rules have a significantly different impact on authorised mutual societies, compared to other authorised bodies. The relevant rules we propose to amend are unlikely to be relevant to mutual societies.

Compatibility with the duty to promote effective competition in the interests of consumers

21. The European Commission introduced the requirement in MiFID II for operators of RIEs running at least one MTF or OTF to join the FSCS so that they are under the same obligation as an investment firm running an MTF or OTF. We think that our fee proposals avoid the requirement having disproportionate consequences for operators of RIEs.

Equality and diversity

22. We are required under the Equality Act 2010 to 'have due regard' to the need to eliminate discrimination and to promote equality of opportunity in carrying out our policies, services and functions. As part of this, we conduct an equality impact assessment to ensure that the equality and diversity implications of any new policy proposals are considered.
23. Our equality impact assessment (EIA) suggests that our proposals do not result in direct discrimination for any of the groups with protected characteristics (i.e. age, disability, gender, pregnancy and maternity, race, religion and belief, sexual orientation and transgender), nor do we believe that our proposals should give rise to indirect discrimination against any of these groups.

Treasury recommendations about economic policy

24. In preparing the proposals as set out in this consultation, we have had regard to the Treasury's recommendations about economic policy.

Annex 4

Abbreviations used in this paper

CA	Competent Authority
CBA	Cost benefit analysis
CP	Consultation Paper
DEPP	Decision Procedure and Penalties manual
DP	Discussion Paper
DRSP	Data Reporting Services Provider
EEA	European Economic Area
EG	the Enforcement Guide
EU	European Union
FSCS	Financial Services Compensation Scheme
FSMA	Financial Services and Markets Act 2000
MiFID	Markets in Financial Instruments Directive
MiFID II	Markets in Financial Instruments Directive II (includes MiFIR, where the context indicates)
MiFIR	Markets in Financial Instruments Regulation
MiFI Regulations	The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017
MTF	Multilateral Trading Facility
OTF	Organised Trading Facility
PRA	Prudential Regulation Authority
PR	Prospectus Rules
RAO	Regulated Activities Order



RDC	Regulatory Decisions Committee
REC	Recognised Investment Exchange sourcebook
RIE	Recognised Investment Exchange
RM	Regulated Market
SI	Statutory Instrument
the Treasury	Her Majesty's Treasury

We have developed the policy in this Consultation Paper in the context of the existing UK and EU regulatory framework. The Government has made clear that it will continue to implement and apply EU law until the UK has left the EU. We will keep the proposals under review to assess whether any amendments may be required in the event of changes in the UK regulatory framework in the future.

We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

You can download this Consultation Paper from our website: www.fca.org.uk.

All our publications are available to download from www.fca.org.uk. If you would like to receive this paper in an alternative format, please call 020 7066 9644 or email: publications_graphics@fca.org.uk or write to: Editorial and Digital team, Financial Conduct Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS



Appendix 1

Draft Handbook text

FINANCIAL SERVICES COMPENSATION SCHEME (EXTENSION OF SCOPE TO RECOGNISED INVESTMENT EXCHANGES) INSTRUMENT 2017

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of the powers and related provisions in the following sections of the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 137A (The FCA’s general rules);
 - (2) section 137T (General supplementary powers);
 - (3) section 139A (Power of the FCA to give guidance);
 - (4) section 213 (The compensation scheme); and
 - (5) section 214 (General).
- B. The rule-making powers listed above are specified for the purpose of section 138G (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 3 January 2018.

Amendments to the Handbook

- D. The modules of the FCA’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2) below:

(1)	(2)
Glossary	Annex A
Fees manual (FEES)	Annex B
Compensation sourcebook (COMP)	Annex C

Citation

- E. This instrument may be cited as the FSCS (Extension of Scope to Recognised Investment Exchanges) Instrument 2017.

By order of the Board
 [date]

[*Editor's note:* The text in this Annex takes account of the changes suggested by CP16/42 'Reviewing the funding of the Financial Services Compensation Scheme' (December 2016) and CP17/17 'Handbook Changes to reflect the application of the EU Benchmarks Regulation' (June 2017), as if they were made.]

Annex A

Amendments to the Glossary of definitions

In this Annex, underlining indicates new text and striking through indicates deleted text.

participant firm (1) a *firm* other than:

~~(1)~~ an *incoming EEA firm* to the extent prescribed for the
(a) purposes of section 213(10) of the *Act* (The compensation scheme) under regulation 2 of the *Electing Participants Regulations* (Persons not to be regarded as relevant persons) unless it has *top-up cover*;

[Note: This covers certain *incoming EEA firms*: see *COMP* 14.1 and 14.2.]

~~(2)~~ a service company;
(b)

~~(3)~~ an *underwriting agent*, or *members' adviser*, in respect of
(c) *advising on syndicate participation at Lloyd's* or managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's;

~~(4)~~ an *authorised professional firm* that is subject to the rules of
(d) the Law Society (England and Wales) or the Law Society of Scotland and with respect to its *regulated activities* participates in the relevant society's compensation scheme;

~~(5)~~ an *ICVC*;
(e)

~~(6)~~ a *UCITS qualifier*;
(f)

~~(7)~~ in respect of the carrying on of *bidding in emissions auctions*, a *firm* that is exempt from *MiFID* under article 291(i);
(g)

~~(8)~~ an *AIFM qualifier*;
(h)

- ~~(9)~~ an operator of an electronic system in relation to lending in
 - ~~(i)~~ respect of operating the system; and
 - ~~(m)~~ a regulated benchmark administrator in relation to
 - ~~(j)~~ administering a regulated benchmark;
- (2) a recognised investment exchange but only insofar as it is operating a multilateral trading facility or operating an organised trading facility.

[*Editor's note:* The text in this Annex takes account of the changes suggested by CP16/42 'Reviewing the funding of the Financial Services Compensation Scheme' (December 2016) as if they were made.]

Annex B

Amendments to the Fees manual (FEES)

In this Annex, underlining indicates new text and striking through indicates deleted text.

6 Financial Services Compensation Scheme Funding

6.1 Application

...

General structure

- 6.1.4 G Section 213(3)(b) of the *Act* requires the *appropriate regulator* to make *rules* to enable the *FSCS* to impose levies on *authorised persons*, and on *recognised investment exchanges that are operating a multilateral trading facility or operating an organised trading facility*, in order to meet its expenses. These expenses include in particular expenses incurred, or expected to be incurred, in paying compensation, borrowing or insuring risks.

...

6.4 Management expenses

...

Base costs levy

- 6.4.5 R Subject to *FEES* 6.3.22R, the *FSCS* must calculate a *participant firm's* share of a *base costs levy* by:
- (1) for *recognised investment exchanges*, providing for £1,000 per *RIE* for each *financial year* of the *compensation scheme* (other than in the *financial year* in which the *recognised investment exchange* becomes a *participant firm*, when its share is nil);
 - (2) for other *participant firms*:
 - (1) identifying the *base costs* which the *FSCS* has incurred, or expects to incur, in the relevant *financial year* of the *compensation scheme*, but has not yet levied, and allocating 50% of those *base costs* (less any contribution to be made by *recognised investment exchanges* under (1)) as the sum to be levied on participants in all the activity groups listed in *FEES*
 - (a)

4 Annex 1AR;

- (2) calculating the amount of the *participant firm's regulatory costs* as a proportion of the total *regulatory costs* relating to all *participant firms* (other than recognised investment exchanges) for the relevant *financial year*; and
 - (3) applying the proportion calculated in (b) to the sum in (a).
- (c)

...

New participant firms

- 6.4.8 R A firm or a recognised investment exchange which becomes a *participant firm* part way through a *financial year* of the *compensation scheme* will not be liable to pay a share of a *specific costs levy* made in that year.

...

6.4A Management expenses in respect of relevant schemes

Obligation on participant firm to pay

- 6.4A.1 R A *participant firm* (but not a recognised investment exchange) must pay to the *FSCS* a share of each *MERS* levy.

...

6.5 Compensation costs

...

New participant firms

- 6.5.9 R A firm or a recognised investment exchange which becomes a *participant firm* part way through a *financial year* of the *compensation scheme* will not be liable to pay a share of a *compensation costs levy* made in that year.

...

6 Annex 3AR Financial Services Compensation Scheme – classes

This table belongs to *FEES* 6.4.7AR and *FEES* 6.5.6AR

...

	Investment
...	
Class D2	Investment and Structured Deposits intermediation

Firms with permission for:	<i>intermediation of structured deposits (except for managing investments in relation to structured deposits)</i>
	Any of the following in relation to <i>designated investment business</i> :
	<i>dealing in investments as principal;</i>
	<i>dealing in investments as agent;</i>
	<i>MiFID business bidding;</i>
	<i>arranging (bringing about) deals in investments;</i>
	<i>making arrangements with a view to transactions in investments;</i>
	<i>advising on investments;</i>
	<i>providing basic advice on a stakeholder product;</i>
	<i>safeguarding and administering investments;</i>
	<i>arranging safeguarding and administering of assets;</i>
	<i>operating a multilateral trading facility;</i>
	<i><u>operating an organised trading facility;</u></i>
<i>agreeing to carry on a regulated activity which is within any of the above;</i>	
<i>BUT excluding activities that relate to long-term insurance contracts or rights under a stakeholder pension scheme or a personal pension scheme.</i>	
<u>Recognised investment exchanges</u>	<i><u>recognised investment exchanges that are operating a multilateral trading facility or operating an organised trading facility</u></i>
...	

...

[*Editor's note:* The text in this Annex takes account of the changes suggested by CP16/42 'Reviewing the funding of the Financial Services Compensation Scheme' (December 2016), as if they were made.]

Annex C

Amendments to the Compensation sourcebook (COMP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

5 Protected claims

...

5.2 What is a protected claim?

...

Claims in respect of Law Society members etc

5.2.3 R Notwithstanding *COMP* 5.2.1R and paragraph ~~(4)~~ (1)(d) of the definition of *participant firm*, where the *relevant person* is in default:

...

...

5.5 Protected investment business

5.5.1 R *Protected investment business* is:

...

(6) the *intermediation of structured deposits*;

(7) the activities by a recognised investment exchange of operating a multilateral trading facility or operating an organised trading facility.

provided that the territorial scope condition in *COMP* 5.5.2R is satisfied and, for a *firm* acting as the manager or *depository* of a *fund*, one of the conditions in *COMP* 5.5.3R is satisfied.

...

TP 1 Transitional Provisions

TP 1.1 Transitional Provisions Table

(1)	(2)	(3)	(4)	(5)	(6)
	Material to which the transitional provision applies		Transitional Provision	Transitional provision: dates in force	Handbook Provisions coming into force
...					
41	<u>Amendments introduced by the FSCS (Extension of Scope to Recognised Investment Exchanges) Instrument 2017</u>	R	<u>The changes referred to in (2) do not apply in relation to a <i>claim</i> against a <i>recognised investment exchange</i>, or against a <i>successor</i>, arising from acts or omissions before 3 January 2018.</u>	<u>From 3 January 2018 indefinitely</u>	<u>3 January 2018</u>

...

MiFID 2 (DEFERRED MATTERS) INSTRUMENT 2017

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of:
- (1) the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
 - (a) section 73A (Part 6 Rules);
 - (b) section 84 (Matters which may be dealt with by prospectus rules);
 - (c) section 137A (The FCA’s general rules);
 - (d) section 137T (General supplementary powers); and
 - (e) section 139A (Power of the FCA to give guidance);
 - (2) the powers of direction, guidance and related provisions in or under the following provisions of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017, (SI 2017/701):
 - (a) paragraph 7 Schedule 1 (Guidance);
 - (b) paragraph 14 Schedule 1 (Statements of policy);
 - (c) paragraph 19 Schedule 1 (Application of Part 11 of the Act (information gathering and investigations)); and
 - (d) paragraph 22 Schedule 1 (Application of Part 26 of the Act (notices));
 - (3) the powers of direction, guidance and related provisions in or under the following provisions of the Financial Services and Markets Act 2000 (Data Reporting Services) Regulations 2017, (SI 2017/699):
 - (a) regulation 20 (Guidance);
 - (b) regulation 27 (Statement of policy);
 - (c) regulation 33 (Application of Part 11 of the Act (information gathering and investigations)); and
 - (d) regulation 37 (Application of Part 26 of the Act (notices)); and
 - (4) the other rule and guidance making powers listed in Schedule 4 (Powers exercised) to the General Provisions of the Handbook.
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 3 January 2018.

Amendments to the Handbook

- D. The modules of the FCA’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2).

(1)	(2)
Glossary of definitions	Annex A
Decision Procedure and Penalties manual (DEPP)	Annex B
Prospectus Rules sourcebook (PR)	Annex C

Notes

- E. In Annexes B and C to this instrument, the “notes” (indicated by “**Note:**”) are included for the convenience of readers and do not form part of the legislative text.

Material outside the Handbook

- F. The Enforcement Guide (EG) is amended in accordance with Annex D to this instrument.

Citation

- G. This instrument may be cited as the MiFID 2 (Deferred Matters) Instrument 2017.

By order of the Board
[date] 2017

[*Editor's note*: The text in the following Annexes takes into account the changes made by PS17/14 'Markets in Financial Instruments Directive II Implementation – Policy Statement II'.]

Annex A

In this Annex, underlining indicates new text and striking through indicates deleted text.

qualified investor (in *PR*) (as defined in section 86(7) of the *Act*) in relation to an *offer* of *transferable securities*:

...

(c) a *person* who is an *eligible counterparty* in accordance with article ~~24~~ 30 of *MiFID* and has not, before the making of the *offer*, agreed in writing with the relevant firm (or each of the relevant firms) to be treated as a *non-professional client* in accordance with the final paragraph of Section I of Annex II of *MiFID*; or

(d) a *person* whom:

(i) any relevant firm is ~~is~~ authorised to continue to treat as a *professional client* in accordance with immediately before 3 January 2018 by virtue of article ~~71(6)~~ 71.6 of ~~*MiFID*~~ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments; and

(ii) the firm may continue to treat as a *professional client* from 3 January 2018 by virtue of Section II.2 of Annex II to *MiFID*.

Annex B

Amendments to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underlining indicates new text.

2 Statutory notices and the allocation of decision making

...

2.5 Provision for certain categories of decision

...

2.5.18 G Some of the distinguishing features of notices given under enactments other than the *Act* are as follows:

...

(4) The FCA is only required to give a single *supervisory notice* under Regulations 28 and 36 of the *MiFI Regulations*. No representations can be made to the FCA after the issuing of this notice, but the matter can be referred to the *Tribunal*.

...

2 Annex 1G Warning notices and decision notices under the Act and certain other enactments

...

The Small and Medium Sized Business (Finance Platforms) Regulations 2015	Description	Handbook reference	Decision maker
...			
<u>Markets in Financial Instruments Regulations 2017</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Paragraphs 12(1)(a) and 13(1)(a) of Schedule 1</u>	<u>when the FCA is proposing or deciding to publish a statement</u>		<u>RDC</u>
<u>Paragraphs 12(1)(b) and 13(1)(b) of</u>	<u>when the FCA is proposing or deciding to impose a penalty</u>		<u>RDC</u>

<u>Schedule 1</u>			
<u>Paragraph 21(7) of Schedule 1</u>	<u>when the FCA is proposing or deciding to require restitutions to be paid</u>		<u>RDC</u>

<u>Data Reporting Services Regulations 2017</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulations 25(1)(a) and 26(1)(a)</u>	<u>when the FCA is proposing or deciding to publish a statement</u>		<u>RDC</u>
<u>Regulations 25(1)(b) and 26(1)(b)</u>	<u>when the FCA is proposing or deciding to impose a financial penalty</u>		<u>RDC</u>
<u>Regulation 36(7)</u>	<u>when the FCA is proposing or deciding to require restitutions to be paid</u>		<u>RDC</u>

2 Annex 2G Supervisory notices

...

<u>The Payment Accounts Regulations 2015</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
...			
<u>Markets in Financial Instruments Regulations 2017</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulations 10(2) and 12(2)</u>	<u>when the FCA is exercising its power of intervention in respect of a third country firm</u>		<u>RDC or executive procedures</u> <u>(see DEPP 2.5.7G and DEPP 2.5.7AG)</u>

<u>Regulation 28(4)</u>	<u>when the FCA is imposing a limitation, restriction or requirement under regulation 24</u>		<u>Executive procedures</u> <u>(see DEPP 2.5.18G)</u>
<u>Regulation 36(4)</u>	<u>when the FCA is imposing a requirement under regulation 36</u>		<u>Executive procedures</u> <u>(see DEPP 2.5.18G)</u>
<u>Regulations 40(3) and 40(6)</u>	<u>when the FCA is proposing or deciding to impose a requirement, or deciding to not rescind the imposition of a requirement that has already taken effect under regulation 40</u>		<u>RDC</u>

<u>Data Reporting Services Regulations 2017</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulation 22(6)</u>	<u>when the FCA is imposing a limitation or other restriction under regulation 22</u>		<u>RDC or executive procedures</u> <u>(see Note)</u>

Note: The RDC will take the decision to give a notice imposing a restriction or limitation if it involves restricting a *person* from providing a *data reporting service*. Otherwise the decision to give a notice will be taken by FCA staff under *executive procedures*.

...

Sch 3 Fees and other required payments

...

3.2G

The FCA's power to impose financial penalties is contained in:
...
the <i>Small and Medium Sized Business (Credit Information) Regulations</i>
the <i>MiFI Regulations</i>
the <i>DRS Regulations</i>

Sch 4 Powers Exercised

...

4.2G

The following additional powers and related provision have been exercised by the <i>FCA</i> to make the statements of policy in <i>DEPP</i> :

...

Regulation 29 (Application of Part 26 of the 2000 Act) of the <i>Immigration Regulations</i>
--

<u>Paragraph 7 of Schedule 1 (Guidance) of the <i>MiFI Regulations</i></u>
--

<u>Paragraph 14 of Schedule 1 (Statements of Policy) of the <i>MiFI Regulations</i></u>

<u>Paragraph 22 of Schedule 1 (Application of Part 26 of the Act) of the <i>MiFI Regulations</i></u>
--

<u>Regulation 27 (Statements of Policy) of the <i>DRS Regulations</i></u>

Annex C

Amendments to the Prospectus Rules sourcebook (PR)

In this Annex, underlining indicates new text and striking through indicates deleted text.

1 Preliminary

...

1.2 Requirement for a prospectus and exemptions

Requirement for a prospectus

1.2.1 UK Sections 85 and 86 of the *Act* provide for when a *prospectus* approved by the *FCA* will be required:

85	...		
86	Exempt offers to the public		
	...		
	(7)	“Qualified investor”, in relation to an offer of transferable securities, means –	
		...	
		(d)	a person whom –
		(i)	any relevant firm is <u>was</u> authorised to continue to treat as a professional client in accordance with immediately before 3 January 2018 by virtue of Article 71.6 (transitional provisions) article 71(6) of that directive <u>Directive 2004/39/EC on markets in financial instruments; and</u>
		(ii)	<u>the firm may continue to treat as a professional client from 3 January 2018 by virtue of Section II.2 of Annex II to the markets in financial instruments directive.</u>
	...		

...

App 1.1 Relevant definitions

App **Note:** The following definitions relevant to the *prospectus rules* are extracted from

1.1.1

the <i>Glossary</i> .			
...			
<i>qualified investor</i>	(as defined in section 86(7) of the <i>Act</i>) in relation to an <i>offer</i> of <i>transferable securities</i> :		
	...		
	(c)	a <i>person</i> who is recognised as an <i>eligible counterparty</i> in accordance with article 24 <u>30</u> of <i>MiFID</i> and has not, before the making of the <i>offer</i> , agreed in writing with the relevant firm (or each of the relevant firms) to be treated as a <i>non-professional client</i> in accordance with the final paragraph of Section I of Annex II of <i>MiFID</i> ; or	
	(d)	a <i>person</i> whom:	
	(i)	any relevant firm is <u>was</u> authorised to continue to treat as a <i>professional client</i> in accordance with immediately before 3 January 2018 by virtue of article 71(6) 71.6 of <i>MiFID</i> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments; and	
	(ii)	<u>the firm may continue to treat as a <i>professional client</i> from 3 January 2018 by virtue of Section II.2 of Annex II to <i>MiFID</i>.</u>	
...			

Annex D

Amendments to the Enforcement Guide (EG)

Insert the following new sections after EG 19.33 (The Small and Medium Sized Business (Finance Platforms) Regulations 2015). All the text is new and is not underlined.

19 Non-FSMA powers

...

19.34 Markets in Financial Instruments Regulations 2017

19.34.1 The *MiFI Regulations* in part implement *MiFID*. The *FCA* has investigative and enforcement powers in relation to both criminal and civil breaches of the *MiFI Regulations* (including requirements imposed on persons subject to the *MiFI Regulations* by *MiFIR* and any directly applicable EU regulation made under *MiFIR* or *MiFID*). The *MiFI Regulations* impose requirements on:

- (1) *persons* holding positions in relevant contracts for commodity derivatives trading on *trading venues* and for *economically equivalent OTC contracts*, whether or not the *persons* are authorised; and
- (2) exempt *investment firms* providing services in *algorithmic trading*, *direct electronic access* or acting as a general clearing member or in relation to the synchronisation of business clocks.

The *MiFI Regulations* also give the *FCA* the powers to investigate and enforce breaches of article 28 of *MiFIR* and any directly applicable EU regulation made under *MiFIR*.

19.34.2 The *FCA's* approach to enforcing under the *MiFI Regulations*, whether the *person* is authorised or not, will mirror our general approach to enforcing the *Act*, as set out in *EG 2*. We will seek to exercise our enforcement powers in a manner that is transparent, proportionate, responsive to the issue and consistent with our publicly stated policies. We will also seek to ensure fair treatment when exercising our enforcement powers. Finally, we will aim to change the behaviour of the *person* who is the subject of our action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance and, where appropriate, to remedy the harm caused by the non-compliance.

19.34.3 The regulatory powers which the *MiFI Regulations* provide to the *FCA* include:

- (1) the power to require information and appoint investigators;
- (2) powers of entry and inspection;
- (3) the power to publicly censure;
- (4) the power to impose financial penalties;

- (5) the power to apply for an injunction or restitution order;
- (6) the power to require restitution;
- (7) the power to impose limitation, restriction or requirement; and
- (8) the power to prosecute relevant offences.

19.34.4 In addition, the *MiFI Regulations* provide the power to require the removal of persons from the management board of an *investment firm*, *credit institution* or *recognised investment exchange*. This is a supervisory power, rather than a disciplinary one, and it may be exercised whenever the *FCA* deems it necessary for the purpose of any of our functions under *MiFID* or *MiFIR*.

19.34.5 The *MiFI Regulations*, for the most part, mirror the *FCA*'s investigative, sanctioning and regulatory powers under the *Act*. The *FCA* has decided to adopt procedures and policies in relation to the use of those powers akin to those we have under the *Act*. Key features of the *FCA*'s approach are described below.

The conduct of investigations under the MiFI Regulations

19.34.6 The *MiFI Regulations* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *MiFI Regulations*.

19.34.7 The *FCA* will notify the subject of the investigation that we have appointed investigators to carry out an investigation under the *MiFI Regulations* and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The *FCA* expects to carry out a scoping visit early on in the enforcement process in most cases. The *FCA*'s policy in civil investigations under the *MiFI Regulations* is to use powers to compel the provision of information in the same way as we would in the course of an investigation under the *Act*.

Decision making under the MiFI Regulations

19.34.8 The decision making procedure for those decisions under the *MiFI Regulations* requiring the giving of a *warning notice*, *decision notice* or a *supervisory notice* are dealt with in *DEPP*.

19.34.9 The *MiFI Regulations* do not require the *FCA* to have published procedures for commencing criminal prosecutions. However, in these situations the *FCA* expects that we will normally follow our decision making procedures for the equivalent decisions under the *Act*, as set out in *EG 12*.

19.34.10 The *MiFI Regulations* do not require the *FCA* to have published procedures to apply to the court for an *injunction* or restitution order. However, the *FCA* will normally follow our decision making procedures for the equivalent decisions under the *Act*, as set out in *EG 10* and *EG 11*.

19.34.11 The *MiFI Regulations* require the *FCA* to give third party rights as set out in

section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act*.

- 19.34.12 Certain *FCA* decisions (for example a requirement to reduce the size of a position, publication of a statement and the imposition of a penalty) may be referred to the *Tribunal* by an aggrieved party.

Imposition of penalties under the MiFI Regulations

- 19.34.13 When determining whether to take action to impose a penalty or to issue a public censure under the *MiFI Regulations* the *FCA*'s policy includes having regard to the relevant factors in *DEPP* 6.2 and *DEPP* 6.4. The *FCA*'s policy in relation to determining the level of a financial penalty includes having regard, where relevant, to *DEPP* 6.5 to *DEPP* 6.5D.
- 19.34.14 As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving civil breaches of the *MiFI Regulations* to assist us to exercise our functions under the *MiFI Regulations* in the most efficient and economic way. See *DEPP* 5, *DEPP* 6.7 and *EG* 5 for further information on the settlement process and the *settlement discount scheme*.
- 19.34.15 The *FCA* will apply the approach to publicity that is outlined in *EG* 6, read in light of the applicable publicity provisions in section 391D of the *Act*.

Removal of persons from management boards under the MiFI Regulations

- 19.34.16 The power under Part 5 of the *MiFI Regulations* to remove a person from a management board may be used in respect of an *investment firm*, *credit institution* or *recognised investment exchange*.
- 19.34.17 This power may be used where the *FCA* considers that the removal is necessary for the purpose of exercising functions under *MiFID* or *MiFIR*. Examples of where this power may be used include, but are not limited to, ensuring that all members of the management body:
- (1) are of sufficiently good repute;
 - (2) possess sufficient knowledge, skills and experience to perform their duties;
 - (3) commit sufficient time to perform their functions;
 - (4) do not hold too many directorships;
 - (5) act with honesty, integrity and independence of mind; and
 - (6) have no conflicts of interest.
- 19.34.18 The *FCA* will have regard to all relevant circumstances, on a case-by-case basis, taking into account the specific circumstances of the *investment firm*, *credit institution* or *recognised investment exchange* and the member of the management board. The *FCA* will exercise this power fairly and proportionately.

19.34.19 It should be noted that, while the *FCA* will have regard to the range of regulatory tools at its disposal, we are not required to exhaust all other options before imposing the requirement to remove.

19.34.20 The *FCA* will take into account all relevant circumstances when considering whether to require the removal to occur immediately or on a specified date.

Statement of policy in section 169(7) (as implemented by the MiFI Regulations)

19.34.21 The *MiFI Regulations* apply section 169 of the *Act* which requires the *FCA* to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the *MiFI Regulations* the *FCA* will follow the procedures described in *DEPP 7*.

19.35 Data Reporting Services Regulations 2017

19.35.1 The *DRS Regulations* in part implement *MiFID*. The *FCA* has investigation and enforcement powers in relation to both criminal and civil breaches of the *DRS Regulations* (including requirements imposed on *persons* subject to the *DRS Regulations* by *MiFIR* and any directly applicable EU regulation made under *MiFIR* or *MiFID*). The *DRS Regulations* impose requirements on *data reporting services providers* (“DRSPs”) which are entities authorised or verified to provide services of:

- (1) publishing trade reports (“*APA*”);
- (2) reporting details of transactions (“*ARM*”); and
- (3) collecting trade reports (“*CTP*”).

19.35.2 The *FCA*’s approach to enforcing the *DRS Regulations* will mirror our general approach to enforcing the *Act*, as set out in *EG 2*. We will seek to exercise our enforcement powers in a manner that is transparent, proportionate, responsive to the issue, and consistent with our publicly stated policies. We will also seek to ensure fair treatment when exercising our enforcement powers. Finally, we will aim to change the behaviour of the *person* who is the subject of our action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance, and where appropriate, to remedy the harm caused by the non-compliance.

19.35.3 The regulatory powers which the *DRS Regulations* provide to the *FCA* include:

- (1) the power to require information and appoint investigators;
- (2) powers of entry and inspection;
- (3) the power of public censure;
- (4) the power to impose financial penalties;

- (5) the power to impose a limitation or other restrictions;
- (6) the power to apply for an *injunction*;
- (7) the power to require restitution; and
- (8) the power to prosecute unauthorised providers.

19.35.4 In addition, the *DRS Regulations* also provide the power for the *FCA* to take criminal or civil action for misleading the *FCA*.

19.35.5 The *DRS Regulations*, for the most part, mirror the *FCA*'s investigative, sanctioning and regulatory powers under the *Act*. The *FCA* has decided to adopt procedures and policies in relation to the use of those powers akin to those we have under the *Act*. Key features of the *FCA*'s approach are described below.

The conduct of investigations under the *DRS Regulations*

19.35.6 The *DRS Regulations* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *DRS Regulations*.

19.35.7 The *FCA* will notify the subject of the investigation that we have appointed investigators to carry out an investigation under the *DRS Regulations* and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The *FCA* expects to carry out a scoping visit early on in the enforcement process in most cases. The *FCA*'s policy in civil investigations under the *DRS Regulations* is to use powers to compel the provision of information in the same way as we would in the course of an investigation under the *Act*.

Decision making under the *DRS Regulations*

19.35.8 The decision making procedure for those decisions under the *DRS Regulations* requiring the giving of a *warning notice*, *decision notice* or a *supervisory notice* are dealt with in *DEPP*.

19.35.9 For decisions made by *executive procedures* the procedures to be followed will be those described in *DEPP* 4.

19.35.10 The *DRS Regulations* do not require the *FCA* to have published procedures for commencing criminal prosecutions. However, in these situations the *FCA* expects that we will normally follow our decision making procedures for the equivalent decisions under the *Act*, as set out in *EG* 12.

19.35.11 The *DRS Regulations* do not require the *FCA* to have published procedures to apply to the court for an *injunction* or restitution order. However, the *FCA* will normally follow our decision making procedure for the equivalent decisions under the *Act*, as set out in *EG* 10 and *EG* 11.

19.35.12 The *DRS Regulations* require the *FCA* to give third party rights as set out in

section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act*.

- 19.35.13 Certain *FCA* decisions (for example the publication of a statement and the imposition of a penalty) may be referred to the *Tribunal* by an aggrieved party.

Imposition of penalties under the DRS Regulations

- 19.35.14 When determining whether to take action to impose a penalty or to issue a public censure under the *DRS Regulations* the *FCA*'s policy includes having regard to the relevant factors in *DEPP* 6.2 and *DEPP* 6.4. The *FCA*'s policy in relation to determining the level of a financial penalty includes having regard, where relevant, to *DEPP* 6.5 to *DEPP* 6.5D.

- 19.35.15 As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving civil breaches of the *DRS Regulations* to assist us to exercise our functions under the *DRS Regulations* in the most efficient and economic way. See *DEPP* 5, *DEPP* 6.7 and *EG* 5 for further information on the settlement process and the *settlement discount scheme*.

- 19.35.16 The *FCA* will apply the approach to publicity that is outlined in *EG* 6, read in light of applicable publicity provisions in section 391D of the *Act*.

Statement of policy in section 169(7) (as implemented by the DRS Regulations)

- 19.35.17 The *DRS Regulations* apply section 169 of the *Act* which requires the *FCA* to publish a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. For the purposes of the *DRS Regulations* the *FCA* will follow the procedures described in *DEPP* 7.

